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In the Supreme Court of the United States

OCTOBER TERM, 1985

COLORADO FLYING ACADEMY, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners assert that the Federal Aviation Administration (FAA) is liable for a mid-air collision between petitioners' aircraft and another private plane because of the FAA's alleged negligence in designing the terminal control area surrounding the Denver Stapleton International Airport.

1. a. In carrying out its responsibility to regulate navigable airspace, the FAA has created terminal control areas (TCAs), *i.e.*, airspace surrounding an airport that is subject to the control of air traffic controllers, throughout the country (Pet. App. A5). The primary purpose of the TCAs is to increase safety by separating commercial jets from smaller planes (*id.* at A5-A6). The TCA for the Denver Stapleton International Airport was established on March 28, 1974 (*id.* at A5). Although the FAA provided general

guidelines for TCA design, Gerald Wilson, an FAA airspace specialist, had the primary responsibility for designing the configuration of the Denver TCA (*id.* at A6). The TCA design in effect at the time of the accident was adopted only after proposals, public comment, and revisions (*ibid.*; *id.* at A13-A16, A34-A36).[1]

On June 21, 1974, a Piper Seneca owned by petitioner Colorado Flying Academy collided with a Beechcraft Bonanza (Pet. App. A3). The trainee pilot in the Seneca was practicing landing approaches using the instrument landing system (*ibid.*). Just prior to the collision, the Seneca had been cleared for a specified landing approach; the instructor was the pilot in command (*id.* at A4).[2] The approach glide brought the Seneca briefly below the floor of the TCA. At that time, the Bonanza, which was flying around Denver outside the TCA, flew into the Seneca's starboard side (*id.* at A7-A8).

b. Petitioners brought this suit against the government under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, seeking damages for the loss of the Seneca and indemnity for the payments they made in settlement with the heirs of the four persons who died in the Bonanza (Pet. App. A9). The district court dismissed petitioner's suit on the ground that it was barred by the discretionary function exception to the FTCA, 28 U.S.C. 2680(a), and the negligence of the two pilots (Pet. App. B23-B34; 506 F. Supp. 1221, 1227-1230). The court of appeals affirmed (Pet. App. A1-A43; 724 F.2d 871), ruling that the district

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[1]At the time of the accident, the Denver TCA resembled an inverted wedding cake with three layers surrounding the airport (Pet. App. A6-A7; see Pet. 17).

[2]The approached used is a published Instrument Approach Procedure designed by the FAA and known as the 8R ILS Back Course Approach (Pet. App. A3-A4).

court had properly applied the discretionary function exception (Pet. App. A16). The court of appeals also noted that the pilots' negligence might be a complete bar to petitioners' recovery under state law, which applies in suits against the government under the FTCA (*id.* at A40-A41).

2. The decision of the court of appeals is correct, does not conflict with any decision of this Court or of any other court of appeals, and presents no significant legal issue. Accordingly, review by this Court is not warranted.

a. Petitioners' own negligence bars any recovery in this case wholly aside from the discretionary function exception. Under Colorado law, which is applicable to this suit against the government under the FTCA (Pet. App. B23), comparative negligence acts as a complete bar to any recovery where the plaintiff's negligence is greater than "the negligence of the person against whom recovery is sought." Colo. Rev. Stat. § 13-21-111(3) (1973); *Graf* v. *Tracy*, 194 Colo. 1, 4 & n.5, 568 P.2d 467, 468 & n.5 (1977); Pet. App. A41.[3] The district court found that the negligence of the instructor pilot of the Seneca "was a primary cause of the mid-air collision" (Pet. App. B21).[4] By contrast, the

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[3]In addition to petitioners' direct claim for the loss of the Seneca, which is barred by the pilots' greater negligence, petitioners also assert a claim for indemnification for the amounts paid in settlement to the heirs of the occupants of the Bonanza (Pet. App. A24-A25). However, petitioners would be entitled to indemnification only if they are secondarily liable and the party from whom they seek recovery is primarily liable (*id.* at A28). The district court expressly found that each pilot's negligence was a primary cause of the collision while the FAA's negligence was not a primary cause (*id.* at B21), and the court of appeals affirmed (*id.* at A28). Accordingly, petitioners' indemnity claims are also barred by the pilots' negligence. Petitioners do not pursue their indemnity claim in this Court.

[4]The district court also found that the negligence of the pilot of the Bonanza was a primary cause of the accident (Pet. App. B21). As the district court explained, "each [pilot] failed to maintain the level of

negligence of the FAA in designing the TCA was found to be a proximate, but not a primary, cause of the mid-air collision (*ibid.*). These findings, which were not disturbed by the court of appeals, do not merit further review. See, *e.g., United States* v. *Doe*, 465 U.S. 605, 613-614 (1984); *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980). Accordingly, because the negligence of petitioner's pilot was greater than the negligence of the FAA, petitioners could not recover under state law regardless of the scope of the discretionary function exemption to the FTCA.[5]

Petitioners contend (Pet. 54-57) that the lower courts improperly applied a per se rule that the pilots were negligent merely because they had a collision. However, the district court's finding of negligence was not based solely on the occurrence of the collision. The district court also found that the accident occurred in clear weather with a visibility of 60 miles (Pet. App. B9), that the Seneca's blind spot did not prevent the instructor pilot from seeing the Bonanza (*id.* at B19-B20), and that the instructor pilot was negligent in failing to see and avoid the Bonanza (*id.* at B21). The district court's finding that the pilots were not sufficiently vigilant in maintaining a proper lookout for other aircraft, and were thereby negligent, is consistent with the decided cases. See, *e.g., Rudelson* v. *United States*, 602 F.2d 1326, 1330 (9th Cir. 1979) (pilot negligent because of failure to watch for other planes as required by FAA regulations).

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vigilance required of pilots [by] the Federal Aviation Regulations and by good operating practice. When pilots operate within an airport traffic area, the duty to keep a proper lookout is sharpened because the sky is more congested" (*id.* at B25).

[5]The district court's failure to fix exact percentages for the negligence of each party was, at most, harmless error. See *Lonardo* v. *Litvak Meat Co.*, 676 P.2d 1229 (Colo. App. 1983) (jury's failure to apportion negligence of each party was harmless where appellate court could rely on jury's other findings to determine whether plaintiff's recovery was barred under the state comparative negligence statute).

Petitioners have cited no decision to the contrary. Accordingly, because the pilots' negligence bars any recovery by petitioners against the United States irrespective of the discretionary function exception, further review of their claims is not warranted.

b. In any event, the lower courts correctly held that the discretionary function exception bars relief in this case. The FTCA is a limited waiver of sovereign immunity that makes the federal government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment. The discretionary function exception, however, precludes liability for any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused" (28 U.S.C. 2680(a)).

As this Court explained in *Dalehite* v. *United States*, 346 U.S. 15, 33 (1953) (footnote omitted), the scope of this exception is broad, covering not only federal agencies but "all employees exercising discretion." "It * * * includes determinations made by executives or administrators in establishing plans, specifications or schedules of operation. Where there is room for policy judgment and decision there is discretion" (*id.* at 35-36 (footnote omitted)). *Dalehite*'s broad interpretation of the exception's scope was reaffirmed in *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984). There, the Court stressed that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case" and that "the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee—whatever his or her rank—are of the nature and quality that Congress intended to shield from tort liability" (*id.* at 813).

The FAA's activities through which the Denver TCA was established fall squarely within the discretionary function exception to the FTCA. *Varig* held that allegedly faulty airplane inspections were within the exception, and that a particular inspection decision was not outside its scope simply because it applied general agency policy or specific regulations to a given factual situation (see *id.* at 814-820). For the reasons given by the lower courts (Pet. App. A13-A16, B31-B32), upon whose opinions we rely, the FAA's actions regarding the planning, design, and implementation of the Denver TCA are not materially different from the type of activities that *Varig* found covered by the discretionary function exception.

Petitioners erroneously assert (Pet. 21-43) that the court of appeals' decision conflicts with the post-*Varig* decisions of other courts of appeals. None of the cases petitioners cite which hold the discretionary function exception inapplicable[6] involved the FAA's design of TCAs or any similar type of activity.[7] Indeed, the FAA's actions in designing the

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[6]Most of the cases that petitioners cite held that the discretionary function exception barred suit against the government. See *Ostera* v. *United States*, 769 F.2d 716, 718 (11th Cir. 1985) (decision whether to release prisoner for use as an informant); *Baxley* v. *United States*, 767 F.2d 1095, 1097-1098 (4th Cir. 1985) (FAA's decision not to regulate "ultralight" aircraft); *Shuman* v. *United States*, 765 F.2d 283, 292-294 (1st Cir. 1985) (alleged failure to warn government contractors' employees of the hazards of asbestos); *Feyers* v. *United States*, 749 F.2d 1222, 1227 (6th Cir. 1984) (alleged failure properly to supervise private inspections of railroad cars), cert. denied, No. 84-1423 (May 28, 1985); *General Public Util. Corp.* v. *United States*, 745 F.2d 239, 248 (3d Cir. 1984) (alleged failure to warn of nuclear reactor equipment failure and failure to exercise due care in licensing nuclear reactor), cert. denied, No. 84-790 (Feb. 19, 1985). None of these decisions, therefore, conflicts with the court of appeals' decision here.

[7]In two cases, an agency violated its own regulations or procedures. See *National Carriers, Inc.* v. *United States*, 755 F.2d 675, 677-678 (8th Cir. 1985) (failure to follow regulations regarding contaminated beef); *McMichael* v. *United States*, 751 F.2d 303, 306-307 (8th Cir. 1985)

Denver Stapleton TCA qualify under petitioner's own analysis of the exemption. Petitioners concede (Pet. 45-46) that the FAA had the discretion to decide whether to adopt a TCA system, where to locate TCAs, and how TCAs should be designed. Petitioners claim (Pet. 46-47) that the FAA required that all instrument approaches be entirely within each TCA, and that the designer of the Denver TCA failed properly to implement this decision. However, that argument is factually erroneous, as both courts below held (Pet. App. A13-A15, B31-B32).[8] As the court of appeals found (*id.* at A13-A14), the FAA directive on which petitioners rely provides local airports with the discretion to tailor the design of TCAs to fit local needs. Moreover, the trial testimony showed that only those instrument approach procedures normally used by large turbine-powered aircraft, not the type of aircraft involved in this accident, were to be contained within the TCA airspace.[9] The decision not

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(munitions inspectors merely "review[ed] [a] checklist for safety compliance" and therefore did not make discretionary judgments). The other case involved the negligent placement of buoys. See *Drake Towing Co.* v. *Meisner Marine Constr. Co.*, 765 F.2d 1060 (11th Cir. 1985). Because the FAA's activities in designing and operating terminal control areas is far more similar to the agency's activities in *Varig* than the government's actions in *Drake*, *Drake* offers petitioners no support.

[8]Indeed, contrary to petitioners' assertions, the court of appeals appears to have accepted petitioners' characterization of the discretionary function exception (Pet. App. A12). The court of appeals noted that "[i]f such mandatory guidelines [for the design of TCAs] existed and they were violated, then the discretionary function exception would not bar recovery" (*ibid.*).

[9]The evidence at trial revealed a policy disagreement at the Washington level between various divisions within the FAA over the manner in which safety objectives would best be achieved. Ultimately, the policy that all instrument approach procedures would be fully contained within TCA airspace was adopted two years after the accident at issue in this case (X Tr. 20-22; see generally Appellee's Br. 13-17). This decision represented a change in policy at the Washington level that required adjustments to a number of existing TCAs. It does not indicate any misapplication of the FAA's original policy by the Denver TCA designer.

to include within the Denver TCA all of the approach procedures used by the Seneca aircraft was within the discretion of the individual TCA designer. Accordingly, even under petitioners' interpretation of the discretionary function exception, that exception was correctly applied in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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